S & S Power Switchgear Ltd v TopRank Corp Sdn Bhd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–243 OF 2003
JAMES FOONG, ZAINUN ALI AND SULONG MATJERAIE JJCA
24 FEBRUARY 2010

B

Civil Procedure — Summary judgment — Triable issues — Documentary evidence of sum owed — Doctrine of account stated — Whether balance claimed by appellant could be recovered as account stated

C

The respondent had ordered components from the appellant, an Indian company, to fabricate high voltage electric transmission switchgears for Tenanga Nasional Bhd ('TNB'). Although TNB had paid the respondent in full for the switchgears supplied, the respondent had not paid the appellant the full amount due and owing. The appellant thus commenced the instant action against the respondent for the balance of the purchase price of goods sold and delivered. The respondent alleged that the goods supplied by the appellant were defective but the end-consumer had not rejected the goods supplied and continued to use the same. The appellant then applied for summary judgment for the sum of RM2,494,907.02 on the grounds of account stated as evidenced by a written document dated 16 April 1999. It was the appellant's case that the parties, who were desirous of settling the matter, had met and carried out an exhaustive exercise of verifying the various figures in the account books of both parties to determine the true amount due and payable by the respondent to the appellant and at the close of this meeting it had been determined that the amount of RM2,494,907.02 was due and payable from the respondent to the appellant. The appellant further submitted that this amount of RM2,494,907.02 was evidenced in writing in a document dated 16 April 1999 ('the written document') and signed by the accountants of both parties. The respondent argued that the written document was a unilateral decision made by the appellant and that it could not give rise to an account stated without the agreement of the other party. The respondent thus submitted that the appellant's reliance on the doctrine of account stated was misconceived and without basis. When the deputy registrar refused to grant the appellant's application for a summary judgment the appellant appealed to the High Court which also dismissed the appeal. This was the appellant's appeal against that decision. The sole issue for the court's consideration was whether the balance claimed by the appellant could be recovered as an account stated.

D

E

F

G

H

I

Held, dismissing the appeal with no order as to costs:

(1) This was a clear case where the respondent truly owed the appellant the

sum claimed. The account stated was binding on both parties and the averments of the respondent were inconsistent with contemporaneous documentary evidence of the account stated. Both parties had signed the account stated and agreed between themselves as to the amount due and payable to the appellant from the respondent. This was a settlement of account wherein the stating of the account itself was consideration to support this action (see paras 30–31 & 35).

(2) Although there was clear evidence that the parties had agreed to a sum payable, the High Court judge found that summary judgment could not be granted to the appellant. Sensitive to the uniqueness of the facts of this case the instant appeal was also dismissed. However, the High Court order was to be substituted with the condition that the respondent be allowed to defend this action after paying into the court the sum of RM2,494,907.02 within 30 days of this order failing which final judgment would be entered against the respondent for the sum claimed with interest (see paras 36–37).

[Bahasa Malaysia summary

Responden telah membuat tempahan komponen-komponen daripada perayu, sebuah syarikat dari India, untuk memasang siap transmisi elektrik 'switchgear' yang bervoltan tinggi untuk Tenaga Nasional Bhd ('TNB'). Walaupun TNB telah membuat bayaran penuh kepada responden bagi 'switchgear' yang dibekalkan, responden masih belum menjelaskan jumlah tertunggak dan perlu dibayar. Perayu seterusnya memulakan tindakan ini terhadap responden untuk mendapatkan baki harga barangan yang dijual dan dihantar. Responden mendakwa bahawa terdapat kecacatan pada barangan yang dibekalkan oleh perayu tetapi pengguna akhir tidak menolak barangan yang dibekalkan dan masih menggunakannya. Perayu kemudiannya memohon penghakiman ringkas bagi jumlah RM2,494,907.02 berdasarkan kepada penyata akaun seperti yang dibuktikan oleh dokumen bertulis bertarikh 16 April 1999. Perayu menghujahkan bahawa pihak-pihak, yang hendak menyelesaikan perkara tersebut, telah berjumpa dan menjalankan tindakan menyeluruh untuk menentusahkan angka-angka di dalam buku akaun kedua-dua pihak untuk mengenalpasti angka sebenar jumlah tertunggak dan perlu dibayar dan di penutup perjumpaan tersebut, telah dikenalpasti jumlah sebanyak RM2,494,907.02 adalah jumlah tertunggak dan perlu dibayar oleh responden kepada perayu. Perayu seterusnya berhujah bahawa jumlah RM2,494,907.02 telah dibuktikan di dalam dokumen bertarikh 16 April 1999 ('dokumen bertulis') dan ditandatangani oleh akauntan-akauntan kedua-dua pihak. Responden selanjutnya berhujah bahawa dokumen bertulis tersebut adalah keputusan satu pihak yang dibuat oleh perayu dan ini tidak boleh membawa kepada penyata akaun tanpa persetujuan pihak satu lagi. Responden dengan itu berhujah bahawa perayu dengan bergantung kepada doktrin penyata akaun tersebut adalah salah tanggapan dan tidak berasas. Apabila timbalan pendaftar

enggan membenarkan permohonan penghakiman ringkas oleh perayu, perayu merayu kepada Mahkamah Tinggi yang juga menolak rayuan tersebut. Ini adalah rayuan perayu terhadap keputusan tersebut. Satu-satunya isu untuk pertimbangan mahkamah adalah sama ada tuntutan baki oleh perayu boleh didapatkan semula sebagai suatu penyata akaun.

Diputuskan, menolak rayuan tanpa perintah untuk kos:

(1) Ini adalah satu kes nyata di mana responden sememangnya berhutang dengan perayu terhadap jumlah yang dituntut. Penyata akaun tersebut mengikat kedua-dua pihak dan penegasan responden adalah tidak konsisten dengan keterangan dokumentari semasa penyata akaun. Kedua-dua pihak telah menandatangani penyata akaun dan bersetuju antara satu sama lain terhadap jumlah tertunggak dan perlu dibayar kepada perayu daripada responden. Ini adalah penyelesaian akaun di mana penyataan akaun tersebut dengan sendirinya merupakan balasan untuk menyokong permohonan ini (lihat perenggan 30–31 & 35).

(2) Walaupun tiada bukti jelas bahawa pihak-pihak telah bersetuju terhadap jumlah yang perlu dibayar, hakim Mahkamah Tinggi mendapati bahawa penghakiman terus tidak boleh diberikan kepada perayu. Sensitif dengan keunikan fakta-fakta kes, rayuan ini juga ditolak. Walau bagaimanapun, perintah Mahkamah Tinggi diganti dengan syarat bahawa responden dibenarkan membela permohonan ini selepas membayar kepada mahkamah jumlah sebanyak RM2,494,907.02 dalam masa 30 hari perintah ini di mana kegagalannya akan menyebabkan penghakiman muktamad akan dimasukkan terhadap responden bagi jumlah tuntutan dengan faedah (lihat perenggan 36–37).]

Notes

For cases on triable issues, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 8316–8423.

Cases referred to

Re Laycock v Pickles & Anor (1863) 4 B & S 497 (refd)

Shahul H Amirudin (Sonia Anirudhan with him) (Zul Rafique & Partners) for the appellant.

Alvin Tang (Faisal Moideen with him) (Shook Lin & Bok) for the respondent.

Sulong Matjeraie JCA (delivering judgment of the court):

[1] This is the judgment of this court. This appeal was brought before us after the learned High Court judge dismissed the appellant's appeal against the decision of the deputy registrar in refusing to grant the appellant's application for a summary judgment.

[2] The appellant is claiming for the sum of RM2,494,907.02 together with interest based on the following grounds:

(a) the balance of purchase price for goods sold and delivered by the appellant to the respondent; and

(b) the account stated as evidenced by a written document dated 16 April 1999.

FACTS OF THE CASE

[3] The appellant is an Indian company which manufactures equipment components and parts that are generally used in the generation, transmission and distribution of electricity, including switchgears (also known as a vacuum circuit breaker or VCB). The function of a switchgear is to trip and disconnect the supply of electricity in the event of electrical fault, irregularities or over current, to prevent fire or an explosion.

[4] The respondent procured two contracts from Tenaga Nasional Bhd ('TNB').

[5] The respondent ordered goods from the appellant by way of a purchase order dated 16 December 1994 for 1,140 sets of components to fabricate high voltage electric transmission switchgears at a purchase price of RM8,807,640.

[6] The respondent was allowed reasonable time to inspect and if necessary to reject the goods and the terms of the purchase allowed the respondent a period of 90 days, and more often than not 150 days, from the date of delivery of the goods to make payment.

[7] Some 15 months later, ie on 16 March 1996, the respondent placed a further order with the appellant by way of a purchase order for 59 components of differing specifications for making switchgears at a price of RM956,110.

[8] As and when the goods were dispatched, the appellant issued to the respondent the corresponding invoices for the goods shipped as well as for relevant services rendered in respect thereof.

[9] TNB was the end-consumer.

[10] The goods supplied by the appellant were assembled and processed by the respondent and the respondent would supply, install, test and commissioned the completed switchgears for TNB at the latter's high voltage electricity transmission lines and/or substations.

[11] TNB has not, to date, rejected the goods supplied and to date, TNB continues to use the switchgears.

[12] TNB has paid the respondent in full for the switchgears supplied.

[13] Yet after receiving the full payment, the respondent alleged that the goods supplied by the appellant were defective.

[14] The respondent has yet to pay the appellant the full amount due and owing.

NO DEFENCE TO THE APPELLANT'S CLAIM

[15] Notwithstanding that full payment had been received by the respondent from TNB and none of the goods supplied were rejected and returned by TNB, the respondent had only made part payment for the goods. Even that part payment was only received long after receiving delivery of all the goods from the appellant. It is also useful to indicate that such part payment was made without any qualification whatsoever.

ACCOUNT STATED

[16] It is not disputed by the parties hereto that on 22 March 1999 and 23 March 1999, authorised representatives of the appellant and the respondent met in Chennai, India to discuss accurately the amount due and payable by the respondent to the appellant. The appellant was represented by Mr R Ravi Kula Chandran, its senior manager, finance and accounts while the respondent was represented by Ms Bee Choo Teh, their group accountant.

[17] During the said meeting the respondent wanted the appellant to consider certain debit notes allegedly raised by the respondent but had not been received by the appellant at the time of the meeting. It was then agreed that the respective representatives would return to Chennai the following month (April 1999) so that a final account can be agreed upon.

[18] On 16 April 1999 they met again at Chennai, India and carried out an exhaustive exercise of reviewing and verifying the various figures in the account books and records of both the appellant and the respondent with the sole objective of reconciling the figures and determining the true amount due and payable by the respondent to the appellant.

[19] Agreement was reached at the second meeting held at Chennai on 16 April 1999 and the resulting amount found due and payable by the respondent

to the appellant were set out and recorded in the document found from pp 561–562 of the appeal record (*Jilid* 2) (*Bahagian* C). This document and its contents ('account stated') was approved and signed by the appellant's senior manager for finance and accounts and the respondent's group accountant. These were the very persons who carried out the review and verification exercise at the meeting. This was 'signed by the Accountant' of the respondent and was duly *admitted* as such by the respondent: see para 34 of the affidavit of Yong Ah Huat the managing director of the respondent deposed on 15 December 2000 where he said referring to para 6 of the plaintiff's affidavit, 'save as admit (sic) that the document was jointly signed by the Accountant for the Defendant and Plaintiff, the defendant denies the content of paragraph 6 of the Plaintiff's affidavit'.

[20] For the purpose of completeness of para 6 of the appellant's affidavit deposed on 17 November 2000 by V Ramachandran s/o R Veeraswamy, the senior manager (secretarial and legal) of the appellant said:

> On or about 16.04.1999, The Senior Manager for Finance and Accounts of the Plaintiff abovenamed and the Group Accountant of the Defendant abovenamed met and carried out an exhaustive exercise of verifying the various figures in the account books of both the plaintiff and the defendant with the sole view to reconciliate these figures and to determine the true amount due and payable by the defendant to the Plaintiff. This reconciliated amount was determined at RM2,494,907.02 being payable from the defendant to the Plaintiff and this was evidenced in writing in a document dated 16.04.1999 and signed by these Accountants of the parties hereto respectively.

[21] The minutes of meeting approved by both parties evidencing the above could be seen from pp 693–699 of the appeal record (*Jilid* 2) (*Bahagian* C). The signed statement at p 727 of the appeal record (*Jilid* 2) (*Bahagian* C) shows the amount owed by the respondent as at 31 March 1999 was RM2,803,824.49. Similar figures also appear at p 561 of the appeal record (*Jilid* 2) (*Bahagian* C).

AMOUNT PRAYED FOR IN THE SUMMARY JUDGMENT

[22] In the application by way of summons in chambers filed on 23 November 2000 the total amount prayed for at prayer (a) is RM2,494,907.02. This sum is much less than what was agreed to by the respondent in the account stated.

[23] The sum claimed is obtained by deducting the respondent's said part payment of RM107,497.90 described in the statement of claim at p 25 of the appeal record (*Jilid* 1) (*Bahagian* A and B) from the total of RM2,911,277.50 due under the appellant's invoices described in the statement of claim at pp 24–25 of the appeal record (*Jilid* 1) (*Bahagian* A and B) and thereafter

making a further deduction from the resulting amount on account of all the debit notes raised by the respondent at the second meeting on 16 April 1999 at Chennai, India as described in the statement of claim at p 25 of the appeal record and evidenced in p 562 of the appeal record, the total amount of which debit notes was RM308,872.58. This calculation is recorded in the account stated found at pp 561–562 of the appeal record.

LAW ON ACCOUNT STATED

[24] The law in respect of account stated is a settled — see *Re Laycock v Pickles & Anor* (1863) 4 B & S 497, an English case recorded on 13 November 1863.

[25] There, Blackburn J said at para 506:

> It may have been a great advantage to the defendants that there should be a settlement of the accounts, including many items, in the manner stated; and I think that the stating of account itself was a sufficient consideration to support this action. The question is, whether the balance can be recovered on a count upon an account stated. *An account stated is commonly called an admission of debt; but is merely evidence of it*. There is a real account stated, called in old law an *insimul computassent*, that is to say, when several items of claim are brought into account on either side, and, being set against one another, a balance is struck, and the consideration for the payment of the balance is the discharge of the items on each side. It is then the same as if each item was paid and a discharge given for each, and in consideration of that discharge the balance was agreed to be due. It is not necessary, in order to make out a real account stated, that the debts should be debts in praesenti, or that they should be legal debts. I think equitable claims might be brought into account, and I am not certain that a moral obligation is not sufficient. It is to be taken as if the sums had been really paid down on each side; and the balance is recoverable as if money had been really taken in satisfaction; subject to this, that where some of the items are such that, if they had been actually paid, the party paying them would have been able to recover them back as on a failure of consideration, the account stated would be invalidated …(Emphasis added.)

THE RESPONDENT'S ARGUMENT

[26] Learned counsel for the respondent argued that the appellant is not entitled to rely on the said minutes which the respondent admitted to have been duly signed by its representative. It was argued that the requirements for the doctrine of account stated have not been met. It was further alleged that the minutes as an account stated was a unilateral decision made by the appellant which cannot give rise to an account stated without the agreement of the other

party. It was further submitted that the appellant's reliance on the doctrine of account stated is misconceived and without basis.

[27] It is our view that this cannot be any further from the truth. For the two orders of components made by the respondent to secure from the appellant in the form of various specification for making switchgears an amount of not less than RM9,763,750 was involved.

[28] Both parties tried to work out to reconcile their statement of account and this led to two meetings in Chennai, India. Both parties sent their appropriate representatives to hold discussion and they were able to reconcile their statement of account and came up with an agreed account stated. Despite that the respondent chose not to pay when demanded to do so.

[29] To say that the appellant should be responsible for the alleged problem with TNB is a non-starter as firstly, there is no privity of contract between the appellant and TNB. Secondly, it was the respondent who not only supplied the goods directly to TNB but installed, tested and commissioned the switchgears at TNB's high voltage electricity transmission lines and or substations. The appellant was never involved with such activities performed by the respondent.

[30] We have perused the details found in the account stated and we are satisfied that these were the agreed account stated duly signed by the representatives of both parties. The averments of the respondent were inconsistent with contemporaneous documentary evidence of the account stated. We are of the considered view that the account stated is binding on both parties.

[31] The parties were desirous of settling the matter and worked out the figures in India. Both parties signed the account stated and agreed between them as to the amount that was due and payable to the appellant from the respondent. This was a settlement of account and we feel that the stating of the account itself was a consideration to support this action.

[32] The question is, whether the parties after agreeing to settle the matter between them, can be permitted to resile and deny the very existence of evidence they have signed? We are unanimous that the argument of the respondent is misconceived and without any basis.

DECISION OF THE LEARNED HIGH COURT JUDGE

[33] The learned High Court judge confirmed in his ruling that the

respondent admitted that although they have received payments from TNB they have not paid the appellant when he stated in his judgment as follows:

> Defendan mengakui tidak membuat bayaran kepada Plaintif walaupun bayaran dibuat oleh TNB kepada Defendan atas barangan yang dibekalkan oleh Plaintif.

PRIVITY OF CONTRACT WITH TNB

[34] For the sake of completeness, TNB and the appellant have nothing to do with each other. There is no privity of contract between them. The respondent definitely has a contractual relationship with TNB. Admittedly the components to fabricate high voltage electric transmission switchgears were supplied by the appellant to the respondent but as admitted at paras 6–8 of the respondent at pp 32–33 of the appeal record it was the respondent themselves who had processed and assembled the goods into switchgears prior to supplying, installing, testing and commissioning the switchgears for TNB.

DECISION OF THIS COURT

[35] In view of what had been discussed this is a clear case where the respondent truly owed the appellant the sum claimed. There are strong evidence on the account stated found in a document executed by the respondent confirming in no uncertain term that as at 31 March 1999 as per the books of account of the respondent that a sum of RM2,803,824.49 was due and payable by the respondent to the appellant. The respondent had received the payment from TNB and as such the appellant is entitled to full payment for goods sold and delivered.

[36] It is our view that this is a unique case in that although there is clear evidence that the parties have already agreed to reconcile the debt by having discussion over the matter and subsequently agreeing to a sum payable, yet the learned High Court judge felt that summary judgment cannot be granted to the appellant.

[37] Sensitive to the uniqueness of the facts of this case, it is our unanimous decision to dismiss this appeal with no order as to costs and the deposit for this appeal to be refunded to the appellant on condition that the order of the High Court dated 18 February 2003 be substituted with:

> The Respondent is allowed to defend this action upon payment into the High Court within 30 days hereof a sum RM2,494,907.02 failing which final judgment shall be entered against the Respondent for the sum of RM2,494,907.02 together with interest thereon at a rate of 8% per annum from the date of final judgment to the date of realisation.

Appeal dismissed with no order as to costs.

Reported by Kohila Nesan